

THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by

**DEPARTMENT OF
PARKS AND RECREATION**

from the Executive Officer's December 17, 2001
Disapproval of a Contract with Royston
Hanamoto Alley & Abey, in response to the
request for review submitted by the California
Association of Professional Scientists

BOARD DECISION

PSC NO. 02-01

September 11-12, 2002

APPEARANCES: Steven Bassoff, Attorney, and Chris Voight, Staff Director, on behalf of the California Association of Professional Scientists; Tara Lynch, Staff Counsel, and Karen Wilson, Vice President, California State Parks Foundation, on behalf of the Department of Parks and Recreation.

BEFORE: Ron Alvarado, President; William Elkins, Vice President; Florence Bos and Sean Harrigan, Members.

DECISION

The Department of Parks and Recreation (DPR) has appealed from the Executive Officer's December 17, 2001 decision disapproving DPR's contract (Contract) with Royston Hanamoto Alley & Abey (Contractor). A majority of the Board finds that DPR has not shown that it had an urgent need for the contracted services that could not be met by civil service employees. A majority of the Board, therefore, sustains the Executive Officer's decision disapproving the Contract.

BACKGROUND

The Contract calls for the Contractor to prepare a general plan for the Forest of Nisene Marks State Park (Park). The money to fund the Contract was provided by an anonymous private donor, who gave her donation to the California State Parks Foundation (CSPF), which, in turn, donated it to DPR. The California Association of Professional Scientists (CAPS) has challenged the Contract, asserting that the contracted services can be provided adequately and competently by civil service employees.

PROCEDURAL HISTORY

(Parties' Submissions)

By letter dated June 29, 2001, pursuant to Government Code § 19132, CAPS asked SPB to review the Contract for compliance with Government Code § 19130(b). By memorandum dated August 1, 2001, DPR submitted its response to CAPS' request. By letter dated August 21, 2001, CAPS submitted its reply to DPR's response. On October 12, 2001, SPB sent a memorandum to

DPR asking for additional information. DPR responded to SPB's request for additional information by memorandum dated October 25, 2001.

The Executive Officer issued his decision disapproving the Contract on December 17, 2001. By memorandum dated January 16, 2001, DPR filed an appeal from the Executive Officer's disapproval of the Contract. DPR filed its written argument dated February 22, 2002. CAPS filed its response dated March 21, 2002. DPR filed its reply dated March 29, 2002.

(Private Donation)

In its October 12, 2001 request for additional information, SPB asked DPR for "an explanation of what specific laws apply when private funds are used to do State work." In its October 25, 2001 response, DPR did not dispute that the Contract was subject to SPB review for compliance with Government Code § 19130 even though it was funded through a private donation. In his December 17, 2001 decision, the Executive Officer stated:

In their submissions, the parties have not addressed the issue of whether SPB has the authority to review for compliance with Government Code § 19130 a contract that is being funded with private donations, rather than public funds. In its October 25, 2001 memorandum, DPR cites to Public Resources Code § 5005 as its authority to accept private donations. That section provides that DPR may use private donations, for "any purposes for which [DPR] is created." From this language, it appears, that once DPR accepts private donations under this statute, its use of those donations must be consistent with its public obligations under the law. Therefore, in the absence of any arguments to the contrary, it appears that DPR must use any private donations it receives in a manner that is consistent with the state's civil service mandate and Government Code § 19130.

On appeal to the Board, DPR has not objected to the Executive Officer's conclusion with respect to this issue.

The Board has reviewed the record, including the written arguments of the parties, and heard the oral arguments of the parties, and now issues the following decision.

ISSUES

The following issues are before the Board for consideration:

- (1) Is the Contract authorized by Government Code § 19130(b)(10)?
- (2) Is the Contract authorized by Proposition 35?

DISCUSSION

Government Code § 19130(b)(10)

DPR asserts that the Contract is justified under Government Code § 19130(b)(10), which authorizes a state department to enter into a personal services contract with a private contractor when:

The services are of such an urgent, temporary, or occasional nature that the delay incumbent in their implementation under civil service would frustrate their very purpose.

In order to show that the Contract complies with Government Code § 19130(b)(10), DPR must show that the Contract meets both of its conditions: (1) the contracted services are either urgent, temporary or occasional; and (2) the purpose of those services would be frustrated by the delay in hiring civil service employees to perform them.

There is no dispute in this case that the work that was contracted – the preparation of a general plan for a state park – is the type of work that state civil service employees have historically and customarily performed and can perform adequately and competently.

DPR asserts that it needed to contract this work because, at the time it received the anonymous donation, there were no state employees available to perform the work and, if the work was not started and completed quickly, DPR risked losing the donation.

As the Executive Officer found, although DPR asserts that it may have lost its private donation if it had delayed in preparing the Park's general plan, the documents that DPR has submitted do not support this assertion. There is nothing in any of the letters from CSPF relating to the donation to indicate that the donation was contingent upon DPR's either beginning or completing the general plan by any specified dates. In addition, none of the letters states that the donation would be withdrawn or would have to be returned if any beginning or completion dates were not met.

Moreover, there is nothing in the donation letters to suggest that the donor conditioned the donation on DPR's using a private contractor, rather than state workers, so that the work would be performed more expeditiously. All that the CSPF letters indicate is that a donor wanted the funds used for the purpose of preparing a general plan for the Park in an efficient and timely manner. No documentation submitted to the Board indicates that the donor would not have been willing to fund the project if DPR had used civil service employees, instead of a private contractor to perform the work, or that the donor would have withdrawn the donation if DPR had performed the work utilizing civil service employees, even if that might have caused some delay in the completion of the plan. In addition, DPR has not submitted any information to indicate that, before contracting, it made an effort to determine whether the contracted work could be performed in a timely manner through the use of civil service employees. DPR asserts that, at the time the donation was offered, although the current hiring freeze was not then in effect, DPR was under a mandate not to increase the number of positions available in the department. DPR, however, has not submitted any information to show what efforts, if any, it made to determine whether it could have staffed the project utilizing civil service employees. For examples, there is no information in the record to show that DPR made any attempt to determine whether it could have adjusted its existing priorities and staffing assignments to take advantage of the generous donation it had received or created limited-term appointments to perform the services.

The donor first gave CSPF the donation in May 1999. DPR issued its Request for Proposal in March 2000. DGS approved the Contract in December 2000 and work began in January 2001. As of the date of oral argument, the Contractor had not yet completed the plan. Given this long delay between when the donor first offered the funds and when the work is being conducted, and the absence of any information to show that DPR made an effort to determine whether it could

staff the project utilizing civil service staff without jeopardizing the donation, the Board finds that DPR has not shown that the contracted services were of such an urgent, temporary, or occasional nature that the delay incumbent in their implementation under civil service would have frustrated their very purpose. The Board, therefore, concludes that the Contract is not authorized under Government Code § 19130(b)(10).

Proposition 35

On appeal, DPR asserts that, in addition to Government Code § 19130(b)(10), the Contract is also permitted under Article XXII, § 1 of the California Constitution and Government Code § 4525 et. seq. Article XXII, § 1 of the California Constitution and Government Code § 4525 et. seq. were enacted as part of Proposition 35, an initiative entitled “Public Works Projects. Use of Private Contractors for Engineering and Architectural Services”, which was approved by the voters on November 7, 2000, and became effective on November 8, 2000.

CAPS objects that DPR cannot raise this authority for the Contract for the first time on appeal, but, instead, was required to have included it in its arguments before the Executive Officer. CAPS asserts further that the Board does not have authority to determine whether the Contract complies with either Article XXII, § 1 of the California Constitution or Government Code § 4525 et. seq.

Generally, a department must include in its submissions to the Executive Officer all the subdivisions of Government Code § 19130 upon which it relies to support a personal services contract. Upon timely objection, the Board will not review a contract for compliance with a subdivision of Government Code § 19130 when that subdivision is raised for the first time on appeal to the Board and was not included in any submissions to the Executive Officer.¹

In addition, the Board will not review a contract for compliance with constitutional or statutory provisions that are not within its jurisdiction. As set forth in Government Code §§ 19131² and 19132³ and Public Contract Code § 10337⁴, when evaluating a personal

¹ See, Department of Pesticide Regulation (2002) PSC No. 01-09, pp. 7-11.

² Government Code § 19131, in relevant part, provides:

....Any employee organization may request, within 10 days of notification, the State Personnel Board to review any contract proposed or executed pursuant to subdivision (a) of Section 19130. The review shall be conducted in accordance with subdivision (b) of Section 10337 of the Public Contract Code. Upon such a request, the State Personnel Board shall review the contract for compliance with the standards specified in subdivision (a) of Section 19130.

³ Government Code § 19132, in relevant part, provides:

...The State Personnel Board, at the request of an employee organization that represents state employees, shall review the adequacy of any proposed or executed contract which is of a type enumerated in subdivision (b) of Section 19130. The review shall be conducted in accordance with subdivision (c) of Section 10337 of the Public Contract Code. ...

⁴ Public Contract Code § 10337, in relevant part, provides:

services contract, SPB's review is restricted to determining solely whether a challenged contract complies with Government Code § 19130; SPB does not review whether a contract may also be authorized by other constitutional or statutory provisions outside the State Civil Service Act.⁵ Thus, SPB will not review whether the Contract may be authorized by Article XXII, § 1 of the California Constitution and Government Code § 4525 et. seq.

CONCLUSION

The Board finds that DPR has not submitted sufficient information to establish that the Contract is authorized by Government Code § 19130(b)(10). The Board, therefore, sustains that Executive Officer's decision disapproving the Contract.

STATE PERSONNEL BOARD

William Elkins, Vice President
Florence Bos, Member
Sean Harrigan, Member

...(b) The State Personnel Board shall direct any state agency to transmit to it for review any contract proposed or executed pursuant to subdivision (a) of Section 19130 of the Government Code, if the review has been requested by an employee organization notified pursuant to Section 19131 of the Government Code. The review shall occur prior to any review conducted by the Department of General Services. The board shall restrict its review to the question as to whether the contract complies with the provisions of subdivision (a) of Section 19130 of the Government Code and any additional standards and controls established pursuant to subdivision (a) of this section. The board may disapprove the contract only if it determines that the contract does not comply. ...

(c) A contract proposed or executed pursuant to subdivision (b) of Section 19130 of the Government Code shall be reviewed by the State Personnel Board if the board receives a request to conduct such a review from an employee organization representing state employees. Any such review shall be restricted to the question as to whether the contract complies with the provisions of subdivision (b) of Section 19130 of the Government Code. ...

⁵ Government Code § 18500 et seq.

President Alvarado, dissenting:

I respectfully dissent from the majority's decision. I believe that DPR had an urgent, temporary and focussed need to complete the general plan for the Park in order not to jeopardize the very generous private donation it had received, and that the delay that would have been caused by trying to finalize the general plan utilizing civil service employees would have put the donation in jeopardy . I would, therefore, find that the Contract is authorized under Government Code § 19130(b)(10).

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision at its meeting on September 11-12, 2002.

Walter Vaughn
Executive Officer
State Personnel Board

[DPR-CAPS-02-01-dec]